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Submission to ALRC IP 46 – Interim Report 127

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In Chapter 6 of IP46, vested property rights are recognised to include “*copyright and other intellectual property rights*”.¹ For the purposes of the Inquiry “*the ALRC [identified it was to consider] ‘vested property rights’ more in its broad, rhetorical sense, than in its technical sense, in which there are distinct shades of meaning of ‘vested’*”.² However, the Interim Report states that any ‘vested right’ of users of copyright works “*has not been identified yet in law*”.³ It is assumed from this that the ALRC is proposing *not* to further consider the contracting out of the fair dealing exceptions. In light of its prior stated purpose it is submitted this is not appropriate.

Further, it is submitted the above view regarding the fair dealing exceptions is *not* correct. In Australia there is a longstanding *common law right* vested upon users to freely access copyright works. This is reflected in the limited monopolistic rights currently granted by the *Copyright Act 1968* to the authors and owners of copyright works, which are balanced by provisions specifically permitting exceptions to what would otherwise be infringing conduct. User’s vested rights are represented by the current statutory fair dealing exceptions⁴ but developed long before and separately from those provisions. The fair dealing exceptions has existed, in fact, in slightly different forms, in each of Australia’s three pieces of copyright legislation, which in turn were derived from early English law. Noting the High Court recognised the relationship between the first copyright law - the *Statute of Anne 1709* (UK)⁵ (*‘Statute of Anne’*) – and today’s Act;⁶ the journey in fact begins before *Anne*.

The precursor to the modern exceptions was ‘fair abridgment’, which was a judge-made doctrine, that began developing in the mid-1700s to allow the printing and selling of condensed versions of books without infringing the copyright in that book.

¹ ALRC IP 46: Traditional Rights and Freedoms – Encroachments by Commonwealth Law, p.51.

² ALRC Interim Report [7.30].

³ ALRC Interim Report [7.95].

⁴ *Copyright Act 1968* (Cth) ss. 40-43 and 103A-104.

⁵ 8 Anne c 19

⁶ *IceTV Pty Ltd v Nine Network Pty Ltd* (2009) 239 CLR 458, 471[25] per French CJ, Crennan and Kiefel JJ (references omitted). See also *Galerie d’art du Petit Champlain Inc v Théberge* [2002] 2 SCR 336, [30] per Binnie J. For a recent critique on this access/incentive paradigm, see Nicolas Suzor, ‘Access, Progress, and Fairness: Rethinking Exclusivity in Copyright Law’ (2013) 15(2) *Vanderbilt Journal of Technology and Entertainment Law* 297. *Anne* provided: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*

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An ‘abridgment’ drew its expression from the original work but was easier to read, and sometimes an adaptation of some sort, but often a substitute for it.⁷ It was first judicially expounded in the 1740 case of *Gyles v Wilcox*.⁸ Consistently with the express purpose of *Anne*, fair abridgments served an important public purpose: the dissemination of knowledge.⁹ The abridger enriched the public domain by expressing existing ideas and information through a different perspective and for a different purpose. This was through a ‘derivative’ form of expression presented in a condensed manner more palatable to and cheaper for a wider audience than the original works.¹⁰ This dissemination of knowledge was recognised as transcending the copyright owner’s economic and moral interests in relation to the work.¹¹ Indeed, often the abridgment itself was deserving of copyright protection.¹²

The fair abridgment doctrine post-*Anne* was a creature of the Courts. *Anne* was silent on the legal status of abridgments, and it remains unsettled as to whether *Anne* was intended to regulate their production or not.¹³ Copyright then was not as well regarded as perhaps it may be today. When first enacted the British Parliament intended that *Anne* would restrain the publishing industry and its historical monopolistic power by decentralisation.¹⁴ Copyright thus was a mechanism for trade regulation and *not* to be interpreted too broadly;¹⁵ a view, which dominated copyright policymaking until the early 20th Century.¹⁶ Indeed, not only was the grant of the monopoly much more restricted than today, as it was confined to the exclusive rights of *printing* and *selling*, *Anne* was not a code as it was not considered an exhaustive statement of the law.¹⁷ Fair abridgment continued as a right until the 1860s.¹⁸

⁷ David Vaver, ‘Abridgements and Abstracts: Copyright Implications’ (1995) 17(5) *European Intellectual Property Review* 225.

⁸ (1740) 26 ER 489.

⁹ Matthew Sag, ‘The Prehistory of Fair Use’ (2011) 76(4) *Brooklyn Law Review* 1371, 1384-5.

¹⁰ See e.g., *Strahan v Newbery* (1774) Lofft 775; 98 ER 913, 913-14 per Lord Chancellor Aspley:

¹¹ Jane Ginsburg, “‘Une chose publique’”? The author’s domain and the public domain in early British, French and US copyright law’ (2006) 65(3) *Cambridge Law Journal* 636, 648. See also the remarks of de Grey J in the famous *Donaldson v Beckett* litigation, cited in Stephen Parks (ed), *The Literary Property Debate: Six Tracts 1764-1774* (Garland Publishing, 1975) 46.

¹² Richard Godson, *A Practical Treatise on the Law of Patents for Inventions and of Copyright* (Saunders & Benning, 1832) 238.

¹³ See Ronan Deazley, ‘The Statute of Anne and the Great Abridgement Swindle’ (2010) 47(4) *Houston Law Review* 793. There are, however, some with more definitive views: see Alexandra Sims, ‘Appellations of piracy: fair dealing’s prehistory’ (2011) 1 *Intellectual Property Quarterly* 3, 7 (noting *Anne* was passed in full knowledge of the continuing prevalence of abridgments in the book trade’).

¹⁴ B Khan, *Intellectual Property and Economic Development: Lessons from American and European History* (London, Commission on Intellectual Property Rights, 2002) 33-34; Marci Hamilton, ‘Copyright Duration Extension and the Dark Heart of Copyright’ (1996) 14 *Cardozo Arts and Entertainment Law Journal* 655, 659.

¹⁵ Lyman Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (University of Georgia Press, 1991) 28-29.

¹⁶ Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney University Press, 2007) 256-57.

¹⁷ Sims, above n 13, 4.

¹⁸ *Tinsley v Lacy* (1863) 1 H & M 747; 71 ER 327, 330.

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During the 19th Century there developed bodies of jurisprudence, which sanctioned other third party uses of copyright works – being *review*, *criticism* and (later) *fair use*.¹⁹ The word ‘review’ appears to have arisen first in the 1807 decision of *Roworth v Wilkes*.²⁰ ‘Criticism’ appeared a decade later in the decision in *Whittingham v Wooler*.²¹ At the close of the 19th Century reviews were recognised as a necessary aspect of the book trade. As such, ‘fair review’ (or ‘fair criticism’) as an exception had cemented its place in the copyright regime.²² Towards the end of the 19th Century, the notion of ‘fair use’ also had developed. Bowrey argues that the case of *Sayres v Moore*²³ captures its birth.²⁴ While others, such as Patry, argue that *Cary v Kearsley*²⁵ takes that mantle.²⁶ The term ‘fair dealing’ is uniquely Antipodean.

Australia was in fact the first common law country to employ the term ‘fair dealing’ in statutory reference to permitted third party uses of a copyrighted work. Section 28 of the *Copyright Act 1905* (Cth) (*1905 Act*), Australia’s first federal copyright law, provided in broad terms:

Copyright in a book shall not be infringed by a person making an abridgement or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person **making fair extracts from or otherwise fairly dealing with** the contents of the book **for the purpose of a new work, or for the purposes of criticism, review, or refutation**, or in the ordinary course of reporting scientific information. (emphasis added)

Section 28 was intended to restate the common law as developed in 18th and 19th Century England.²⁷ It clearly distinguished between fair dealings that resulted in the creation of a ‘new work’, and those that were for certain purposes: criticism, review

¹⁹ In the early 18th Century, the courts also referred to ‘fair quotations’ as permitted uses of copyright-protected material: see *Wilkins v Aikin* (1810) 34 ER 163, 164 per Lord Eldon; *Mawman v Tegg* (1826) 38 ER 380, 384 per Lord Eldon.

²⁰ (1807) 170 ER 889; 1 Camp 94. It is, however, noteworthy that ‘review’ and ‘criticism’ appeared in argument by counsel, before the courts adopted such terminology: see e.g., *Macklin v Richardson* (1770) 27 ER 451; Amb 694, 696 and *Roworth v Wilkes* (1807) 170 ER 889; 1 Camp 94, 97.

²¹ (1817) 2 Swans 428; 36 ER 679.

²² *Chatterton v Cave* (1878) 3 AC 483, 492 (‘Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like--and if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, ‘a fair use’ only be made of the publication, no wrong is done and no action can be brought.’).

²³ (1785) 102 ER 139

²⁴ Kathy Bowrey, ‘On Clarifying the role of originality and fair use in 19th century UK jurisprudence: appreciating ‘the humble grey which emerges as the result of long controversy’ [2008] *University of New South Wales Law Research Series* 58.

²⁵ (1803) 4 Esp 168.

²⁶ William Patry, *The Fair Use Privilege in Copyright Law* (The Bureau of National Affairs Inc, 1985) 3; while others, such as Sims, argue that *Cary v Kearsley* had nothing to do with fair use or fair dealing, but, instead, the question of whether the defendant’s reproduction was a new and original work: Sims, above n 14, 21. In any event, while the use of the expression ‘fair use’ had solidified after Vice Chancellor Wood handed down judgments in *Jarrold v Houlston* 3 K & J 708, 714-15 (1857) and *Scott v Stanford* LR 3 Eq 718, 722 (1867), the term would not find its way into the *Copyright Act 1911* (UK), and nor into Australia’s copyright laws.

²⁷ Commonwealth, *Parliamentary Debates*, Senate, 28 September 1905, 2912 (John Keating).

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or refutation. In other words, it recognised that allowing fair dealings with a work was concerned with at least two aims: providing enough ‘breathing space’ for future authors; and promoting specific uses of works that, regardless of whether they were deserving of authorship, were socially-valuable.

In 1912 Australia then ‘adopted’ the *Copyright Act 1911* (UK) (‘1911 Act’) by incorporating its provisions into the *Copyright Act 1912* (Cth) (‘1912 Act’).²⁸ In many respects, the 1912 Act was a very different to the 1905 Act it replaced,²⁹ as seen in the fair dealing provision in section 2(1), which provided:

The following ... shall not constitute the infringement of a copyright (i) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary.

The protections granted to fair abridgement by Section 28 of the 1905 Act were not replicated in the 1912 Act. However, As Viscount Haldane noted, Section 2(1) was intended to codify the body of common law principles the courts had developed “*with the greatest care*” in relation to fair reviews and other fair uses.³⁰ The replacement of the 1912 Act with the 1968 Act³¹ saw limited change as fair dealing was re-enacted in substantively the same form. The ‘new’ fair dealing provisions covered essentially the same kinds of uses as prescribed under the 1912 Act: research or private study,³² criticism or review,³³ and news reporting.³⁴ The only substantive changes were the

²⁸ See *Copyright Act 1912* (Cth) s 8. By virtue of s 25(1) of the *Copyright Act 1911* (UK), the 1911 Act applied throughout the dominions of the British Empire. As such, the High Court of Australia later held that the 1911 Act applied in Australia by force of Imperial law, rather than by virtue of any law enacted by the Commonwealth parliament supported by s 51(xviii) of the *Australian Constitution: Gramophone Co Ltd v Leo Feist Incorporated* (1928) 41 CLR 1. As Hansard reports, the 1911 Act was introduced “*To amend and consolidate the Law relating to Copyright*” United Kingdom, *Parliamentary Debates*, House of Commons, vol 23, c1534. For an account of the social, political and economic milieu surrounding the enactment of the 1912 Act, see Atkinson, above n 16, 63-8. Also see United Kingdom, *Parliamentary Debates*, House of Commons, 7 April 1911, vol 23 cc2587-663.

²⁹ Atkinson, above n 16, 89-91. Following from the prescriptive imperial model, and differentially to the 1905 Act it replaced, the 1912 Act exhaustively defined exceptions, which was also notable in comparison with the broader more illustrative method to be found in US ‘fair use’ model. See Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* Cambridge University Press, (2005), 249-260. Particularly at fn 41, where those authors note the lack of Australian debate of the fair dealing provisions in the 1912 Act; and at 259-260 for an overview of *Copinger’s* charting of subsequent development of the restrictive view of fair dealing under the 1911 Act.

³⁰ United Kingdom, *Parliamentary Debates*, House of Lords, 14 November 1911, vol 10, cc 113-66 (Viscount Haldane: ‘The principle of fair dealing is a principle which the Courts have applied with the greatest care. Infringement of copyright cannot be allowed under disguise. All that is done here is to make a plain declaration of what the law is and to put all copyright works under the same wording.’) http://hansard.millbanksystems.com/lords/1911/nov/14/imperial-copyright#S5LV0010P0_19111114_HOL_59. As subsequent authors note: “A common feature of debates on the reform of copyright law since at least 1911 is that [the UK] Parliament has shown a desire to reform the law within the framework set by earlier judicial decisions” – Burrell and Coleman, above n 27, 242.

³¹ While the United Kingdom would replace its 1911 Act with its 1956 Act, the High Court of Australia later held that the former Act was still in force in Australia until the enactment of the 1968 Act: *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, 603.

³² *Copyright Act 1968* (Cth) s 40.

³³ *Copyright Act 1968* (Cth) ss 41, 103A.

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additions of the exceptions permitting reproductions for judicial proceedings, and one of fair dealing for the purpose of professional advice.³⁵

The 1968 Act was subject to scrutiny and amendment in the 1970s. In response to concerns that the inherent uncertainty of the fair dealing threshold meant copyright users were struggling to independently identify the boundaries of how much copying they were permitted to do,³⁶ the Franki Committee recommended extending the definition of what was a ‘reasonable portion’ of copying by introducing set, quantifiable limits for the benefit of copiers.³⁷ It was also recommended that the word ‘private’ be removed from ‘private study’.³⁸ These recommendations were subsequently incorporated into the 1968 Act.³⁹ By the late 1970s it was the position in Australia that the public interests served by the fair dealing exceptions allowing research and study served were considered to be too important, too fundamental, to be replaced by a pay-per-use scheme.

The current fair dealing exceptions are fundamental public interests, which the law *recognises* as transcending the *limited* monopoly of copyright on account of the *public entitlement* to reasonable access to copyright material.⁴⁰ They are, in the broad context of this review, *vested property rights*, which are vested in the users of copyright works. These rights ensure for society as a whole that copyright’s grasp over ideas, information and culture is no stronger than that of the very public domain that copyright seeks to enrich. As such these rights must be appropriately protected.

Implementing this submitter’s prior recommendations to IP 46⁴¹ would not alter the long established balance between creators, owners and users. What it would do is make a difference to the ordinary users, as it would enable proper guidance to be provided by the courts removed from the likelihood of the effects of owner abuse or their own ignorance that arise when fair dealing is left to the mercy of contractual negotiations. Such an amendment would also benefit Australia as a whole. The

³⁴ *Copyright Act 1968* (Cth) ss 42, 103B.

³⁵ *Copyright Act 1968* (Cth) ss 43, 104.

³⁶ Copyright Law Committee on Reprographic Reproduction, *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) [1.26] (‘Franki Committee Report’).

³⁷ *Ibid* [2.60]. Notably, however, these limits were not ‘maximums’, in the sense that they were merely included to act as a guide for users of copyright material. The person relying on the provision could, theoretically, exceed these limits and still receive the benefit of the fair dealing provision; depending, of course, on the application of the other factors relevant to the assessment of ‘fairness’.

³⁸ *Ibid* [1.45].

³⁹ Copyright Amendment Bill (No 2) 1979 (Cth). See also Explanatory Memorandum, Copyright Amendment Bill (No 2) 1979 (Cth) <http://www.austlii.edu.au/au/legis/cth/bill_em/cab21979250/memo_0.html>. “Reasonable portion” was defined as follows: ‘Without limiting the meaning of the expression, the copying of not more than 10 per cent of the number of pages or one chapter of a literary, dramatic or musical work is to be taken to be a reasonable portion of that work’. See *Copyright Act 1968* (Cth) s 40(5)–(7).

⁴⁰ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 246 CLR 561, [97].

⁴¹ Submission #67 dated 23 February 2015.

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precedents established through this process, in particular as the courts consider the application of copyright law in the digital context, would enable the proper development of the copyright regime into our future. As Viscount Haldane noted “[t]he law of fair criticism and reproduction for the purposes of fair criticism is the work of the Courts”;⁴² and so it should remain.

⁴² United Kingdom, *Parliamentary Debates*, House of Lords, 14 November 1911, vol 10, cc 113-66 http://hansard.millbanksystems.com/lords/1911/nov/14/imperial-copyright#S5LV0010P0_19111114_HOL_59.